Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN D. BOND
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS WHERE HE WAS CONVICTED OF KNOWINGLY AND WRONGFULLY USING COCAINE BY A PERMISSIVE INFERENCE THAT WAS NOT RATIONALLY RELATED TO HIS CASE?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Armed Forces, *United States v. Bond*, 46 M.J. 86 (1997), affirming the decision of the Navy-Marine Corps Court of Criminal Appeals is reprinted as Appendix A at Pet. App. 1a. The unpublished opinion of the Navy-Marine Corps Court of Criminal Appeals, *United States v. Bond*, No. 94-01042 (N.M.Ct. Crim. App. September 5, 1995) is reprinted as Appendix B at Pet. App. 18a.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals on May 15, 1997 (Appendix A at Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

Petitioner, a Sailor serving in the United States Navy, was convicted of using cocaine in December 1993. This conviction was based largely on the results of a urinalysis test which revealed the metabolite "benzoylecgonine" in petitioner's urine sample. The only additional "evidence" the government used to obtain this conviction was an instruction from the judge. This instruction advised the members that based on the presence of benzoylecgonine in petitioner's system, they could infer that petitioner "knowingly" used cocaine.

At the time of his trial, petitioner was assigned to Naval Weapons Station Earle, Colts Neck, New Jersey. He was a member of the base security detachment, and was a registered "source" for the Naval Criminal Investigative Service ["NCIS"]. During previous "undercover" work for NCIS in 1992, he was responsible for successful prosecutions involving a theft/fencing

operation aboard the base. During June 1993, he reported to NCIS that he was aware of civilians who were buying and using illegal drugs aboard the base. He was subsequently requested by Special Agent Burton, NCIS, to go undercover for an investigation of these suspects. Specifically, petitioner was given money and instructed to "party" and "socialize" with the suspects, and to report their activities to Special Agent Burton. He was not authorized to use illegal drugs as part of his assignment.

Unbeknownst to petitioner, his "undercover" involvement with NCIS became known among people at Earle. Shortly after he began to work on this assignment, Special Agent Burton received a mysterious phone call that reported petitioner was using drugs. This call, from an unnamed and unregistered "source," reported a "rumor" that petitioner was using drugs with the subjects of the investigation. Special Agent Burton asked petitioner to take a urinalysis test "in order to preserve the integrity of the investigation." Petitioner immediately volunteered to do so.

Petitioner and Special Agent Burton drove together to Willow Grove, Pennsylvania for the test. Special Agent Burton did not read petitioner his rights, nor did she ask him to sign a consent form before he provided the sample. She did not do so because she thought that petitioner was "clean." Special Agent Burton indicated that she was surpised when the sample later revealed the presence of benzoylecgonine.

At trial, the government's case consisted of the urinalysis test results, the testimony of the petty officer who administered the urinalysis, and the testimony of a chemist from the Naval Drug Screening Laboratory, Norfolk, Virginia. The chemist testified that the metabolite benzoylecgonine was not naturally produced

in the human body; rather, it was produced by ingestion of cocaine. He also opined that the level of benzoylecgonine found in petitioner's sample, 6,612 nanograms per milliliter, suggested that petitioner used cocaine within twenty-four to thirty-six hours of providing the sample.

On cross examination, the expert was asked a hypothetical question concerning the amount of cocaine it would take to produce this level. The expert opined that twenty-five to fifty milligrams of cocaine could produce this level, if it were consumed in a drink twenty hours before providing the sample. He also testified that a normal "user" amount of cocaine was fifty to one hundred milligrams, so this amount would be at the "lower end" of a "user" quantity. He further testified that if cocaine were placed in a drink, it would dissolve and would not be tasted.

The expert also testified that if a person had ingested twenty-five milligrams of cocaine, the person would only feel "minimal effects such as numbing sensation on the tongue or lips." He also stated that this amount would not produce "significant psychological effects." Finally, he testified that it was possible for a person to ingest cocaine in this amount and this manner without ever knowing it had been ingested.

In his defense, petitioner did not contest the chain of custody for the sample, nor did he dispute the accuracy of the test results. Instead, he proffered an innocent-ingestion defense and denied that he knowingly used cocaine. He contended that he would not use cocaine the night before he was to take a scheduled urinalysis, and he offered a possible explanation for the (unknowing) presence of cocaine in his system.

Petitioner testified that he spent the entire weekend with his wife and their children at their home

in New York. He further testified that he returned to Earle on Monday and worked the entire day. That night he stated that he attended a baseball game at Earle, where he encountered some of the subjects of the investigation. He testified that he socialized with them, and became intoxicated after he drank three or four beers and a couple of shots of brandy. Petitioner also recalled that he left his cup unattended on the hood of a car while he socialized at the game.

Petitioner vehemently denied that he knowingly used cocaine. When asked to explain how cocaine was found in his urine sample, he said that he did not know. According to petitioner, a possible explanation for the positive test result was that his drink may have been "spiked" by one of the subjects of the investigation.

The defense offered its own expert, a forensic toxicologist. This expert also testified that cocaine dissolved if placed into an alcoholic drink. He also testified that he analyzed petitioner's sample, and that there was no evidence that petitioner attempted to dilute his urine or "flush" his system before he submitted the sample.

During closing argument, the prosecutor called the defense theory a "smoke screen," and he urged the jury to "pay very special attention to the instructions regarding inferences, that which you can infer on the evidence that you have before you today." The defense counsel argued that the case "reeks with reasonable doubt." She stressed that it was not reasonable to conclude that petitioner voluntarily submitted to a urinalysis test immediately after he used cocaine. She further pointed out that the testimony of the experts supported the innocent-ingestion defense under the facts of this case. In rebuttal, the prosecutor summed-up the government's case:

> Finally, the only evidence we got that is solid evidence here today is the fact that there was cocaine in the drug sample that was provided by the accused. Listen closely to the instructions the judge will give you in a few moments, the government is convinced that you will find beyond a reasonable doubt that the accused is guilty of the offense as charged.

The judge instructed the members, *inter alia*, that in order to find petitioner guilty of the offense, they had to find that he "knowingly" used cocaine. They were further instructed that the knowledge element consisted of two additional elements. The first knowledge element required proof petitioner "knowingly" and "consciously" used a substance. The second element required proof that petitioner actually "knew" the substance was a contraband drug. Later, the judge instructed the members on the evidence. Specifically she instructed them:

> In this case, evidence has been introduced which tends to show that Petty Officer Bond submitted a urine sample which later tested positive for the presence of Benzoylecgonine, otherwise known as BZE. If you find beyond a reasonable doubt that the accused's urine contained BZE, and that BZE was present in the accused's urine as a result of the accused having ingested cocaine, you may infer that the accused knew he used cocaine.

> The drawing of this inference, however, is not required and the weight and the effect of this evidence, if any, will depend on all the facts and circumstances, as well as other evidence in this case.

Petitioner was subsequently convicted of the offense. He was sentenced to restriction for sixty days, hard labor without confinement for sixty days, reduction to the lowest enlisted pay grade, and to be discharged from the Navy with a bad conduct discharge.

On review by the Navy-Marine Court of Criminal Appeals, petitioner claimed, *inter alia*, that the evidence was insufficient to establish his guilt beyond a reasonable doubt. That court rejected this claim by noting that the test results revealed cocaine in petitioner's urine sample. This supported the "inference of wrongfulness absent evidence to the contrary." The court concluded, "[h]ere, the evidence to the contrary was not believable, therefore, the inference of wrongfulness remains and we will not overturn appellant's conviction on this basis." (Appendix B, Pet. App. at 22a).

Similarly, the Court of Appeals for the Armed Forces rejected petitioner's claim that the evidence was legally insufficient to sustain his conviction. Petitioner argued that since he raised an innocent-ingestion defense the government was required to provide additional evidence to rebut this defense. Relying primarily on it's earlier decision in *United States v. Ford,* 23 M.J. 331 (C.M.A. 1987), and *Jackson v. Virginia,* 443 U.S. 307 (1979), the court rejected petitioner's argument. The court reasoned that the government had the burden to convince the members to "draw" the permissive inference, and if they did so, the remaining evidence in

the case was sufficient to sustain the finding of guilty. Appendix A, Pet. App. at 9a-10a). In other words, the court held that the test results, coupled with the inference, was legally sufficient to prove that petitioner wrongfully used cocaine. (Pet. App. at 8a-14a)

In a sharply worded dissent, Judge Gierke pointed out that the permissive inference for military drug cases was premised on military-unique factors enunciated in *Ford.* In this case he noted that none of those factors were present. Citing *County Court of Ulster County, New York v. Allen,* 442 U.S. 140 (1979), he wrote that there was no rational basis for the permissive inference in this case, and that he would set aside the conviction. (Pet. App. at 14a-17a).

REASONS FOR GRANTING THE WRIT

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHERE HE WAS CONVICTED OF KNOWINGLY AND WRONGFULLY USING COCAINE BASED ON A PERMISSIVE INFERENCE THAT WAS NOT RATIONALLY RELATED TO HIS CASE.

Efforts to create a "drug free" military have been ongoing since the early 1970's. David G. Evans, J.D., *Drug Testing Law, Technology and Practice, Vol 1.* (1997), § 2:30 at 103. As part of this effort, drug testing has become standard practice as a means to ensure discipline and fitness among servicemembers. *Id.* at 104. Because of this, the military has also established a concomitant body of law for drug cases in the military justice system. *See Id.* at 106.

Long before these efforts took hold, however, Congress codified the crime of drug possession under

Article 134 of the Uniform Code of Military Justice. *Manual for Courts-Martial, 1951,* ¶ 213a at 382. Included in the discussion section of this article was guidance that "[p]ossession of marihuana or a habit forming drug is presumed to be wrongful unless the contrary appears." *Id.* Since 1951 then, the military justice system embraced an evidentiary inference that possession of the drug, alone, was proof that the conduct was "wrongful," and therefore punishable.

Shortly thereafter, the inference was judicially expanded to cases involving drug "use." *United States v. Crawford,* 20 C.M.R. 233 (1955); *United States v. Fears,* 29 C.M.R. 400 (1960). This expansion was justified by "logic and common sense" that drug use necessarily flowed from a previous possession of the drug. Because of this, the inference regarding "possession" was applicable to "use" cases as well. *Crawford,* 20 C.M.R. at 235.

Even in these early decisions, however, there were claims that this rule created an impermissible shifting of the burden of proof to the accused to disprove the inference. *Crawford,* 20 C.M.R. at 236; *Fears,* 29 C.M.R. at 405. These claims were rejected on the basis that the inference was a "permissible" one that may "aid" the government in proving its case, but it did not relieve the prosecution of its burden to establish guilt beyond a reasonable doubt. *Crawford,* 20 C.M.R. at 236; *Fears,* 29 C.M.R. at 405-06.

The inference was expanded again to include cases involving "possession, use, distribution, introduction, or manufacture of a controlled substance." Article 112a, Uniform Code of Military Justice, 10 U.S.C. §912, *Manual for Courts-Martial, United States, 1984,* Part IV, ¶ 37(c)(5). According to this provision, all of the aforementioned acts could be "inferred to be

wrongful in the absence of evidence to the contrary." *Id.* In sum, within twenty years of the inception of its "war on drugs," an evidentiary inference was firmly established in the military justice system that permits court-martial members to find *any* act with illegal drugs to be "wrongful," by proof of the act alone.

Courts and commentators have long recognized there are due process concerns when presumptions or inferences are used in criminal cases. Lester B. Orfield, *Orfield's Criminal Procedure under the Federal Rules, Vol 3,* (1986), § 26:114 at 383. Specifically, if the presumption allows the accused to be found guilty solely on the basis of the presumption unless he comes forward with evidence to overcome it, the practical effect is to coerce the accused into taking the stand in violation of the Fifth Amendment. *Id.*

Additionally, this Court has recognized that if a presumption proves an element of the crime the prosecution cannot otherwise prove, the government has failed to prove guilt beyond a reasonable doubt. *Sandstrom v. Montana,* 442 U.S. 510, 523 (1979). In this situation, the prosecution is "not 'forced to prove beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.'" *Sandstrom,* at 523 *quoting In re Winship,* 397 U.S. 358, 364 (1970). As such, it "conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Sandstrom,* 442 U.S. 510, 523 (1979).

Some of these due process concerns were addressed by this Court in *Tot v. United States,* 319 U.S. 463 (1943). That case examined the provisions of the Federal Firearms Act which made it illegal for a convicted criminal to receive firearms or ammunition through interstate or foreign commerce. *Id.* at 464. The

Act contained a provision that "possession of a firearm or ammunition . . . shall be presumptive evidence that such firearm or ammunition was shipped or transported or received in violation of this Act." *Id.* In that case, the Court held that a statutory presumption cannot be sustained "if there is no rational connection between the fact proved and the fact presumed...." *Id.* at 467.

The Court further held that the presumptive conclusion at issue, that a firearm or ammunition possessed by a convicted criminal must have been in interstate commerce, did not "rationally flow." Under these circumstances, the presumption was constitutionally invalid. *Id.* at 468-69. Similarly, in *United States v. Romano,* this Court struck down a statute that provided that mere "presence" at an illegal still supported the presumption that the person was guilty of "possession, custody, or control" of the still. *United States v. Romano,* 382 U.S. 136 (1965).

This Court examined similar statutory presumptions where the "knowledge" element required in drug cases could be inferred or presumed. In *Leary v. United States,* at issue were provisions of a federal statute which prohibited importation of marijuana into the United States. *Leary v. United States,* 395 U.S. 6 (1969). Specifically, the statute imposed punishment for persons who "knowingly" imported marijuana, or anyone who received, concealed, bought, sold, or transported marijuana, knowing that it had been imported. *Leary* 395 U.S. at 30.

The statute also contained a presumption that authorized conviction if it were proved that the defendant had marijuana "in his possession," unless he "explain[ed] his possession to the satisfaction of the jury." *Leary,* 395 U.S. at 30. Similarly, in *Turner v. United States,* this Court examined an identical

presumption concerning the importation of "narcotic drugs" into the country. *Turner v. United States,* 396 U.S. 398 (1970).

In these cases, this Court reaffirmed the *Tot* rule. The Court held that a criminal statutory presumption must be regarded as "irrational" or "arbitrary" unless there was "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary,* 395 U.S. at 36.

Noting that a significant amount of marijuana was domestically produced, the Court held that there was insufficient evidence to conclude with a "substantial assurance" that even a majority of marijuana possessors "knew" their marijuana was imported. *Leary,* 395 U.S. at 52-3. The Court came to same conclusion regarding cocaine because there was evidence that more cocaine was lawfully produced in the United States than was illegally imported. *Turner,* 396 U.S. at 418-19. On the other hand, the Court upheld the presumption with regard to heroin because there was evidence that heroin was not domestically produced or sold in the United States. *Turner,* 396 U.S. at 408, 416.

The permissive inference for the "knowledge" element in military drug cases has been challenged in recent years. As it did in *Crawford, supra,* the Court of Military Appeals again rejected the "burden shifting" claim by noting that the inference is a permissive one, and that the government retains the burden of persuasion. *United States v. Harper,* 22 M.J. 157, 162 (C.M.A. 1986). The court also concluded there was a "rational connection between contraband drugs and wrongfulness" in the military, so the inference remained valid. *Harper,* 22 M.J. at 162-63.

The constitutionality of the inference was addressed in the case of *United States v. Ford,* 23 M.J.

331 (C.M.A. 1987). In that case, the court analyzed these due process concerns, and posited three factors that provided a rational basis for the inference. First, the court noted that illegal drugs are contraband for all servicemembers, thereby reducing access to drugs and the possibility of innocent-ingestion. Second, due to the military's anti-drug campaign, servicemembers are "on notice" to avoid any and all contact with illegal drugs. This also reduces the possibility of innocent-ingestion. Third, the court noted that the psychological effects of drugs are commonly known, and that a servicemember "generally knows what he consumes." This suggested a "knowing" use of drugs, if the servicemember failed to adequately explain the drug's presence in his system. *Ford,* 23 M.J. at 337. These reasons, the court concluded, justified the use of the inference in drug cases against a military accused. *Id.* at 337.

In this case, however, the factors which justify the application of the inference were not present. Due to his "undercover" assignment, petitioner was encouraged to "hang-out" with suspected drug users--not to avoid contact with them.. It was also clear that petitioner's "cover" was "blown"--thereby making him a possible target for retaliation by suspected drug users. In sum, petitioner's volunteer work for law enforcement enhanced the possibility that he could unknowingly ingest drugs.

The expert testimony in the case further eroded the application of the inference to petitioner's case. Expert testimony confirmed that if cocaine was placed in petitioner's drink, he would not have been able to detect it by sight or taste. Further, the expert testimony also revealed that the amount of benzoylecgonine present in the sample was consistent with an "unknowing" ingestion of cocaine.

Despite this, both lower courts concluded that the evidence was legally sufficient to sustain petitioner's conviction. Moreover, the Court of Appeals for the Armed Forces reaffirmed the rationale of the *Ford* court, noting yet again that the inference was permissive and the prosecution was required to convince the factfinder to draw it. (Pet. App. at 9a-10a). That court further noted that it was not "unmindful of the dangers faced by undercover agents, and aware of the possibility that an agent might be 'set up.'" (Pet. App. at 13a-14a) The court concluded, however, that this theory was presented to the members at trial, and again to the Navy-Marine Court of Criminal Appeals on review. Both rejected it. Under these circumstances, the court refused to "use the rubric of legal sufficiency to usurp the powers of these factfinders and enter our own view of guilt in this case." (Pet App. at 13a-14a).

As Judge Gierke noted in his dissent, the Court of Appeals for the Armed Forces improperly narrowed the scope of its analysis with regard to due process. (Pet. App. at 15a-17a). The court reaffirmed the use of the inference by simply noting that the members are free to accept or reject it. This analysis, however, glosses over the danger of the inference. The inference facilitates a conviction in all drug cases, even in cases where there is not a "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary,* 395 U.S. at 36.

In petitioner's case, the government introduced the results of the urinalysis test, and expert testimony that cocaine is "not naturally produced by the body." The government rested its case and relied on closing argument to carry its burden. The prosecutor's closing argument, in turn, relied on the permissive inference. In short, the government's entire case was established by

the benzoylecgonine detected in petitioner's urine sample, and the inference that this fact alone proved petitioner "knowingly" used of cocaine.

The facts at trial revealed, however, that the inference did not even meet the "more likely than not" standard enunciated in *Leary*. First, the *Ford* factors which justify application of the inference were not present in this case. Rather than avoid drugs and drug users, petitioner was tasked to seek out drug users and socialize with them. It was also evident that his "cover" was "blown," which increased the odds for retaliation by subjects of the investigation. In short, petitioner's involvement with NCIS did not reduce the possibility of him to innocently ingest drugs--it increased it.

More importantly, the *government's expert* witness did not support the "inferred conclusion" of a "knowing" ingestion of cocaine. This conclusion could be drawn solely by the presence of benzoylecgonine in petitioner's urine sample. The expert opined, however, that if the cocaine had been consumed in a drink, petitioner would not have been able to see it or taste it. Moreover, the expert testified that if consumed in this manner, petitioner would have noticed negligible psychological or physical effects from the cocaine. In short, the testimony for the government witness revealed that the amount of benzoylecgonine found in petitioner's sample was consistent with an "unknowing" ingestion.

In sum, neither the foundational basis for the inference, nor the predicate fact upon which it rested, supported a finding of a "knowing" use of cocaine in this case. Nonetheless, the government relied on the inference to obtain a conviction and thereby violated petitioner's right to due process. Under these circumstances, the government was "not 'forced to prove beyond a reasonable doubt . . . every fact necessary to

constitute the crime . . . charged.'" *Sandstrom v. Montana,* 442 U.S. at 523 *quoting In re Winship,* 397 U.S. 358, 364 (1970). As such, petitioner's conviction is constitutionally infirm.

Conclusion

Petitioner's right to due process was violated when he was convicted by an evidentiary inference that was not rationally related to his case. This inference permitted the court-martial members to conclude that petitioner "knowingly" used cocaine simply by finding benzoylecgonine in his urine sample. The lower court affirmed this result by reasoning that the inference was a "permissive" one that the members were entitled to draw.

The lower court's decision was erroneous because it automatically assumed that the inference was rationally related to petitioner's case. In making this assumption, the court ignored its own precedent, and it failed to consider the facts of this case. In sum, the lower court arbitrarily and unfairly applied the inference against petitioner, even though the *inferred* conclusion did not logically flow from the predicate fact on which it was based.

The use of this inference was justified by factors enunciated by the lower court in *United States v. Ford,* 23 M.J. 331 (C.M.A. 1987). Specifically, the inference was applied because of reduced exposure to illegal drugs and the decreased possibility of an unknowing ingestion of illegal drugs by servicemembers. *Id.* at 337.

In this case, however, petitioner's undercover work for NCIS facilitated his exposure to drugs. The facts also revealed that he may have been a target for retaliation once his role was discovered. Most important, expert testimony revealed that the amount of cocaine

found in petitioner's sample did not negate the possibility of an unknowing ingestion. To the contrary, the *government expert* acknowledged the possibility of an unknowing, innocent-ingestion in this case.

Therefore, the foundational basis for this inference was not present in this case. Furthermore, the predicate fact upon which the inference rested also did not logically prove that it was "more likely than not" that petitioner "knowingly" and "wrongfully" used cocaine. Under these circumstances, petitioner was denied his right to the due process when the inference was applied against him.

Moreover, this inference is firmly entrenched in military justice system and is applied in every contested drug case. It is automatically--arbitrarily--applied in these cases without consideration as to whether it logically applies to the facts of the case. Therefore, this Court should address this issue which not adversely affected petitioner in the case *sub judice*, but also threatens the rights of future servicemembers.

Respectfully submitted,

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August 1997

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 96-0156

Crim.App. No. 94 1042

United States, *Appellee*

v.

John D. BOND, Aviation, Electronic's Mate Third Class, U.S. Navy, *Appellant*

Argued Nov. 5, 1996

Decided May 15, 1997

For Appellant: *Lieutenant Commander Eric C. Price*, JAGC, USN (argued).

For Appellee: *Lieutenant K. L. Flynn*, JAGC, USNR (argued); *Colonel Charles Wm. Dorman*, USMC and *Commander D. H. Myers*, (on brief).

Opinion of the Court

SULLIVAN, Judge:

In December of 1993, appellant was tried by a

special court-martial composed of officer members at Naval Base, Philadelphia, Pennsylvania. Contrary to his pleas, he was found guilty of wrongfully using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a bad-conduct discharge, hard labor without confinement for 60 days, restriction for 60 days, and reduction to pay grade E-1. On May 31, 1994, the convening authority approved this sentence, and on September 5, 1995, the Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

This Court granted review of the following issue:

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT WRONGFULLY USED COCAINE BEYOND A REASONABLE DOUBT.

We hold that the evidence is legally sufficient to support the members' finding beyond a reasonable doubt that appellant wrongfully used cocaine. *United States v. Ford*, 23 MJ 331 (CMA 1987); *see generally Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The evidence of record shows that appellant was stationed at Naval Weapons Station Earle, Colts Neck, New Jersey, and assigned to duties as a patrolman in the Base Security Department in march of 1991. In April of 1993, he was temporarily relieved of his normal patrolman duties because of his failure to obey a lawful order. In June of 1993, while in his reduced law enforcement status, he notified Special Agent (SA) Burton of the Naval Criminal Investigative Service (NCIS) about alleged drug use by dependent wives on base. Thereafter, appellant

accepted an offer from NCIS to join in the investigation of these individuals. He was asked to go undercover and to socialize with the suspects and report back on their activities. He was told that he was not authorized to use drugs and that he was to tell the subjects of the investigation, "No, I'm subject to urinalysis; I can't do it."

A few days before July 29, 1993, SA Burton received a phone call from a person who was not a suspect in the investigation and who was not otherwise identified. SA Burton testified that the caller reported a rumor that appellant was using narcotics with the subjects of the investigation. In order to preserve the integrity of the investigation, SA Burton asked appellant if he would submit to a urinalysis. Appellant agreed, and a urinalysis was scheduled for July 29, 1993. Appellant reported for the test, but it was subsequently canceled by SA Burton. It was rescheduled for August 3, 1993.

On August 3, 1993, SA Burton accompanied appellant to the Naval Air Warfare Center, Lakehurst, New Jersey, where the urinalysis was conducted. The urinalysis was held off base to avoid focusing suspicion on appellant as an undercover agent. The urinalysis indicated the presence of benzoylecgonine, a metabolite of cocaine, in the amount of 6,612 nanograms per milliliter. The report on the urinalysis stated:

1. Per references (a) and (b), enclosures (1) through (4) are provided.

Test Method	*Dates*	*Results*
Radioimmunoassay	10 Aug 93	Urine contained total Cocaine metabolites equal to or in excess of the DOD cut-off standard of 150 ng/ml.
Re-Radioimmunoassay	12 Aug 93	Urine contained total Cocaine metabolites equal to or in excess of the DOD cut-off standard of 150 ng/ml.
Gas Chromatography	13 Aug 93	GC/MS confirmed the presence of Benzoylecgonine (Cocaine) in the urine equal to or in excess of the DOD cut-off standard of 100 ng/ml. A concentration of 6,612 ng/ml of the Benzoylecgonine metabolite was present

After the test results were received, appellant was interviewed by SA Burton and made the following statement:

> I am presently assigned to the NWS Earle Security Dept., NWS Earle, Colts Neck, NJ. I have been assigned to NWS Earle since March 91.

Since my arrival on base, I have not been subjected to a urinalysis until Apr 93 when I was relieved of my duties for failure to obey a lawful order. Since that date I have received a urinalysis every month, with the last one occurring on 13 July 93. All urinalysis results were negative.

On or about 27 Jul 93, Special Agent Burton approached me with a request for urinalysis. She explained to me because I was assisting them with a narcotics investigation and because she had received information which implicated me with using narcotics, she would like me to undergo a urinalysis so as not to raise any questions regarding my integrity. Knowing I have not used any type of narcotic, in any way shape or form, I agreed to undergo the urinalysis. I knew I was clean then and I am clean now,so there was no reason for me not to complete a urinalysis. If I as dirty, there is no way I would have agreed to the urinalysis. I know I have a choice to say yes or no, and knowing I had not used any drugs, I consented to the urinalysis.

Initially I was scheduled to take the urinalysis on 29 Jul 93, a Thursday. This was cancelled and rescheduled for Tuesday, 3 Aug 93. I knew a couple of days before the first date that I was going and then I ended up having a week before the date. There is no way I would have done the urinalysis if I had thought it would come back positive. I have not consumed any narcotics and I have no idea why the test results were positive. I am willing to undergo any other examination to show that I have not used any narcotics. I have read over this (2)

page statement, typed for me by Special Agent Burton as we discussed its contents. I have corrected and initialed all mistakes I desire, and it is the truth to the best of my knowledge.

At trial, the Government's case consisted of the evidence of appellant's positive urinalysis noted above, as presented by the senior chemist and the certifying scientist at the Navy Drug Screening Laboratory in Norfolk, Virginia. Their testimony included an explanation of the metabolite benzoylecgonine and how it comes to be present in the body. The Government also provided evidence of the chain of custody of the urine sample, as well as testimony from an observer that the sample was from appellant. The Government's chemist estimated that the provider of the urine sample probably consumed 25-50 milligrams of cocaine from 24 to 36 hours prior to providing the sample.

Appellant did not contest the chain of custody or the accuracy of the test results. Instead, he denied knowingly using drugs and proffered an innocent-ingestion defense. Appellant contended that it would be "absurd" to believe that he, a security officer, would knowingly use cocaine the night before a known, scheduled urinalysis. Appellant also took the stand and offered an explanation as to how the cocaine could have gotten into his system unbeknownst to him. He testified that on August 2, 1993, he encountered the subjects of the investigation at a baseball game. He further testified that while talking to the subjects at the game, he drank three or four beers and two shots of brandy. Appellant stated that, at one point, he lost sight of his cup when he placed it on the hood of a car while talking. He suggested that his drink might have been spiked by the subjects of the investigation when he lost

sight of it. Appellant also testified that this was the only time he might have unknowingly consumed cocaine.

Appellant also cross-examined the Government's chemist and presented expert testimony of his own that cocaine dissolves in alcoholic beverages and cannot be tasted thereafter. The Government's chemist conceded that someone who ingested a small amount of cocaine (equal to the least amount possibly taken by appellant) dissolved in an alcoholic beverage might not know they had ingested cocaine. Also, appellant presented testimony that, unbeknownst to him, his cooperation with NCIS was widely rumored throughout the local naval community.

Finally, appellant presented evidence that he had voluntarily provided the urine sample and highlighted the fat that there was no evidence he had tried to dilute the sample with diuretics or otherwise prior to providing it. Appellant also presented evidence of his good character for law-abidingness and truthfulness.

The granted issue generally questions the legal sufficiency of the evidence supporting appellant's conviction for wrongfully using cocaine in violation of Article 112a. Appellant presents three related arguments why the prosectution's proof is legally insufficient. First, he contends that the prosecution failed to introduce evidence contesting or rebutting the defense evidence of "innocent ingestion." Second, he argues that the prosecution failed to introduce evidence contesting or rebutting evidence of his "common sense" defense. Third, he asserts that, balancing the prosecution's urinalysis evidence against all of the defense evidence "clearly

supports a finding that the evidence is legally insufficient."

Our usual inquiry when reviewing cases for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319; *see United States v. Hart*, 25 MJ 143, 146 (CMA 1987). The limited scope of this inquiry reflects our recognition of "the responsibility of the trier of facy fairly to resolve conflicts in thhe testimony, to weight the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*, quoting *Jackson v. Virginia*, *supra*.

In *United States v. Harper*, 22 MJ 157 (1986), we held that evidence of urinalysis tests, their results, and expert testimony explaining them is sufficient to permit a factfinder to find beyond a reasonable doubt that an accused used marijuana. We also held that a permissive inference of wrongfulness may be drawn by a factfinder from a circumstantial showing of drug use based on such evidence. *Id.* at 161-62; *see United States v. Pabon*, 42 MJ 404, 405-06 (1995). Accordingly, admission of such evidence in appellant's case was sufficient as a matter of law to permit his conviction for wrongful use of cocaine. *Cf. United States v. Murphy*, 23 MJ 310 (CMA 1987).

Nevertheless, appellant argues that such evidence of a positive urinalysis is legally insufficient if the defense introduces evidence of "innocent ingestion" and the prosecution fails to introduce evidence rebutting it. In *United States v. Ford*, 23 MJ 331 (1987), we dealt with a similar argument. There, the accused likewise testified that he did not knowingly use marijuana during the period in

question and likewise suggested a plausible explanation that his estranged wife had the motive, opportunity, and access to the drug to plant it in his food. The prosecution "called no witnesses to rebut this defense evidence but argued to the members that such evidence was incredible or improbable and that the inference of wrongfulness should still be drawn." *Id.* at 336.

In this context, we held that the urinalysis evidence was legally sufficient as long as the defense's evidence of innocent ingestion could be reasonably disbelieved by the factfinders. *Id.* at 334. We said:

> [W]hether to draw an inference of wrongfulness is a question to be decided by the factfinder using the standard of reasonable doubt. It *may* be drawn where no contrary evidence is admitted. However, if the prosecution fails to persuade the factfinder beyond a reasonable doubt that this inference should be drawn, a finding of not guilty is required. *Similarly, the inference of wrongfulness* ***may*** *be drawn where contrary evidence is admitted. However, if the prosecution fails to persuade the factfinder beyond a reasonable doubt that this contrary evidence should be disbelieved or that the inference should otherwise be drawn, a finding of not guilty is required.*

Id. at 335 (emphasis added).

Later on in *Ford*, we made it clear that no further evidence need be presented by the prosecution in the

planted-drug context. We said:

> In any event, *evidence which contradicts directly or circumstantially the inference to be drawn does not per se* bar drawing the inference or *require that the prosecution introduce evidence* that *appellant's wife did not secretly plant marijuana in his food.* Instead, the prosecution had to persuade the members beyond a reasonable doubt on credibility and probability grounds that this evidence should be disbelieved and the inference should nonetheless be drawn and given such weight to find knowledge beyond a reasonable doubt. Accordingly, the evidence is not insufficient on this basis.

Id. at 336 (emphasis added; footnote and citation omitted). Thus, the existence of evidence raising an innocent-ingestion defense in this case did not compel introduction of additional prosecution evidence rebutting it or cause the prosecution's evidence already admitted to become legally insufficient. *See United States v. Matias*, 23 MJ 356, 361 (CMA 1987).

Appellant's next argument why the Government's evidence was legally insufficient focuses on failure of the prosecution to introduce evidence rebutting or contradicting his "common-sense" defense. He basically contends that, since it was established at trial that he was a military police officer who knew the urinalysis was rescheduled for August 3, 1993, it would have been "absurd" for him to knowingly use cocaine during the weekend in question. Absent some evidence contradicting his notice of the test, he argues a factfinder would be unreasonable to infer that he deliberately used drugs knowing he would be caught. Again, we hold that the prosecution was not required to

introduce independent evidence contradicting or rebutting this defense evidence before the members could reasonably draw an inference of wrongfulness. *See United States v. Matias* and *United States v. Ford*, both *supra*.

In this regard, we note appellate government counsel's argument that "[a]ppellant's use can be explained by any number of reasons, including stupidity, poor judgment, or poor timing. Perhaps appellant, in the throes of temptation, momentarily focused only on the present and forgot the future urinalysis." We further note that, during closing argument, trial counsel specifically argued that "drug use and stupidity are not necessarily mutually exclusive. [Appellant] would not be the first stupid person to be convicted if her were to be convicted of drug use."[1] We agree that the evidence of record can be reasonably construed in this manner.

The United States Court of Appeals for the First Circuit in *United States v. Sturm*, 870 F.2d 769 (1989), considered a similar "stupid-criminal" construction of the evidence in assessing legal sufficiency. It said:

> Turning to the second premise, Sturm claims that the evidence was insufficient, as a matter of law, to prove that he knew he was not entitled to the $20,000 fee. Defendant's counsel points out that Sturm negotiated the details of this transaction openly, intended to exchange the logbooks at a prearranged time and place, and made no effort to

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[1] There is an old Danish saying that if lack of money is the mother of crime, its father may well be lack of intelligence. Even Livy, the Latin law moralist, states: "No crime is founded upon reason." Livy, *History*, Book XXXVII, Sec. 28 (circa 10 B.C.).

> conceal his identity. "Sturm was either the stupidest criminal ever arrested by the FBI or a man who honestly thought he was not committing a crime." Brief for the Appellant at 33. This argument is meritless. *When the evidence is considered in light most favorable to the government, it was certainly sufficient to have supported the jury's finding.* The most damning piece of evidence in this regard is that Sturm himself acknowledged that the transaction he was proposing was similar to kidnapping. The jury could also have concluded from Sturm's insistence on being paid in cash that Sturm himself acknowledged that the transaction he was proposing was similar to kidnapping. The jury could also have concluded from Strum's insistence on being paid in cash that Sturm knew that he had something to hide. *As regards the defendant's contentions, the jury may have concluded that Sturm was a stupid criminal, or that he had nothing to gain from concealing his identity or the venue for the exchange. In any event, "[t]he choice among various reasonable constructions of the evidence is for the trier of facts." United States v. Klein*, 522 F.2d 296, 302 (1st Cir. 1975). Accordingly, we affirm the trial court's refusal to enter a Judgment of Acquittal on this ground.

870 F.2d at 775 (emphasis added); *see also United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994) (jury free to choose among reasonable constructions of evidence). Accordingly, appellant's second argument is without merit.

Turning to appellant's final argument, we note that in reviewing records of courts-martial for legal sufficiency,

we do not normally balance the prosecution and defense evidence admitted in a case. *See United States v. McGinty*, 38 MJ 131 (CMA 1993); *United States v. Ford*, *supra*. We do review the entire evidence of record in a light most favorable to the prosecution to see if a reasonable factfinder could have found all the essential elements of the offense beyond a reasonable doubt. 38 MJ at 132; *United States v. Turner*, 25 MJ 324 (CMA 1987); *Harper*, 22 MJ at 161. Moreover, when evidence of an element is rationally incomplete, *see Murphy*, 23 MJ at 310, or supported only by inherently inconsistent prosecutorial evidence, *see United States v. Mack*, 33 MJ 251 (CMA 1991), we have found such evidence to be legally insufficient and have set aside the conviction. *Cf. Pabon*, 42 MJ at 404 (government evidence raised only theoretical possibility of conflict with other government proof of guilt).

We are not unmindful of the dangers faced by undercover agents, and we are aware of the possibility that an agent might be "set up" by the targets of an investigation.[2] However, appellant presented defense evidence at his court-martial for the purpose of rebutting the Government's circumstantial case that he wrongfully used drugs. He contended that this evidence demonstrated the possibility that he was the victim of a set-up by the targets of his undercover investigation. This defense evidence, along with the prosecution's case based on urinalysis testing, was fully considered by the members in

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[2]We note that appellant did not claim he ingested the cocaine "pursuant to legitimate law enforcement activities" because of a fear that either his life or the investigation was in danger of being compromised. *See* para. 37(c)(5), Part IV, Manual for Courts-Martial, United States, 1984.

determining appellant's guilt. Nevertheless, the members who saw and heard the witnesses (*see* Art. 66(c), UCMJ, 10 USC § 866(c)), found him guilty. Moreover, the Court of Criminal Appeals, which also has factfinding power, affirmed the findings of guilty. *See United States v. Grostefon*, 12 MJ 431, 435 (CMA 1982) ("Court of Military Review [now the Court of Criminal Appeals] has the mandatory responsibility to read the entire record and independently arrive at a decision that the findings . . . are correct in law and fact.").

This Court will not use the rubric of legal sufficiency to usurp the powers of these factfinders and enter our own view of guilt in this case. *See United States v. White*, 45 MJ 345, 348 (1996) (United States Court of Appeals for the Armed Forces does not determine guilt or innocence). Instead, adhering to our proper role under Article 67(c) (1989), we conclude, based on all the evidence of record, that a rational factfinder could have found appellant guilty beyond a reasonable doubt of wrongfully using cocaine. *See Jackson v. Virginia*, *supra*.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD and EFFRON concur.

GIERKE, Judge (dissenting):

This case involves an undercover policeman who volunteered to infiltrate a drug ring. Unfortunately, his undercover work became known within the local community. He readily submitted to urinalysis testing. He had advance notice of the urinalysis. He had the ability to

delay the urinalysis but did not. He tested positive for cocaine. At his court-martial he denied *knowingly* using drugs and suggested that those whom he had been investigating may have set him up.

The sole evidence of *knowing* use was a permissive inference of knowledge based on the positive urinalysis. The majority finds this evidence legally sufficient to establish guilty beyond a reasonable doubt. In my view appellant's conviction based on the permissive inference of knowledge, under the facts of this case, offends due process. It places every undercover drug investigator at the mercy of the drug users. Accordingly, I dissent.

As the majority recognizes, evidence supporting a conviction is legally sufficient if a reasonable factfinder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 MJ 324 (CMA 1987). When evaluating the evidence under this standard, we "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker*, 32 MJ 281, 284 (CMA 1991). In my view a reasonable factfinder could not find knowing use based on the evidence of record because knowing use is not a "reasonable inference" from that evidence.

In *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979), decided less than a month before *Jackson v. Virginia*, *supra*, the Supreme Court held that the validity of permissive inferences is reviewed "as applied" to a particular appellant under the specific facts of his or her case. There must be a rationale connection between the fact proved and the fact inferred. An inference is "irrational" or "arbitrary" and thus violates due process

"unless it can at least be said with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." *Barnes v. United States*, 412 U.S. 837, 842 (1973), quoting *Leary v. United States*, 395 U.S. 6, 36 (1969). If the permissive inference is the only proof of guilty, then it must meet a higher standard than "more likely than not"; it must flow from the proved fact beyond a reasonable doubt. *See Turner v. United States*, 396 U.S. 398 (1970); *see also* E. Imwinkelried, P. Giannelli, Fl. Gilligan, and F. Lederer, *Courtroom Criminal Evidence* § 2920 at 975 (2d ed. 1993) ("The foundational fact must prove the inferred fact's existence beyond a reasonable doubt only if the inference is the only possible basis for a guilty finding in the case.").

The rational basis for the inference of knowing use of drugs was first articulated by this Court in *United States v. Ford*, 23 MJ 331, 337 (1987). In *Ford* this Court justified the inference because of three circumstances: (1) drugs are contraband for all servicemembers, thus reducing access to drugs as well as innocent ingestion; (2) servicemembers are on notice "to avoid any and all contact with these substances, a fact which further reduces the possibility of innocent ingestion"; and (3) the physiological effects of drugs are commonly known, so that a servicemember "generally knows what he consumes."

None of these circumstances justifying the inference is present in this case. In the first place, appellant's access to drugs was not reduced by the military environment. His military duties as an undercover policeman increased it. Secondly, he was not on notice to avoid "any and all contact" with drugs. His law enforcement duties required close contact with drugs and drug users. Finally, the Government's own expert testified that the low level of

cocaine metabolites in appellant's urine was consistent with the unknowing use.

Based on the foregoing, I find no rational basis for the permissive inference of knowing use in this case. Under the specific facts of this case, the permissive inference of knowledge does not even pass the "more likely than not" test. It falls short of proving knowledge beyond a reasonable doubt. The only evidence on the issue of appellant's knowledge is his own sworn denial of knowing use and the testimony of the government expert that the low metabolite level was consistent with unknowing use. In my view the prosecution failed to meet its constitutional burden of proving guilty beyond a reasonable doubt. I would set aside the conviction and dismiss the charge.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

W.A. DeCICCO J.E. DOMBROSKI
E.D. CLARK

UNITED STATES

v.

John D. BOND, 085 50 7363
Aviation Electrician's Mate
Third Class (E-4), U.S. Navy

NMCM 94 01042 Decided 5 September 1995

Sentence adjudged 22 December 1993. Military Judge: J.R. James. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Weapons Station Earle, Colts Neck, NJ.

LCDR ERIC C. PRICE, JAGC, USN, Appellate Defense Counsel

Maj LAURA L. SCUDDER, USMC, and *LT KEVIN L. FLYNN*, JAGC, USNR, Appellate Government Counsel

CLARK, Judge:

At a special court-martial consisting of officer

members, the appellant was convicted of wrongful use of cocaine in violation of Uniform Code of Military Justice [UCMJ], Article 112a, 10 U.S.C. § 912a. His approved sentence included reduction to pay grade E-1, restriction for 60 days, hard labor without confinement for 60 days, and a bad-conduct discharge.

The appellant raises seven assignments of error[1]

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[1] I. THE GOVERNMENT FAILED TO PROVE APPELLANT WRONGFULLY USED COCAINE BEYOND A REASONABLE DOUBT.

II. APPELLANT'S RECORD OF TRIAL IS INCOMPLETE IN THAT PAGES 03-105 ARE MISSING, THUS RENDERING THE RECORD INCOMPLETE AND INSUFFICIENT FOR THOROUGH APPELLATE REVIEW.

III. A SENTENCE INCLUDING AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S PRIOR SERVICE AND MILITARY CHARACTER.

IV. THE MILITARY JUDGE ERRED BY FINDING CLEAR AND CONVINCING EVIDENCE OF APPELLANT'S VOLUNTARY CONSENT TO THE URINALYSIS WHEN: (1) APPELLANT WAS REQUIRED TO TAKE THE URINALYSIS BY AN NCIS AGENT HANDLING APPELLANT IN AN UNDERCOVER DRUG OPERATION, (2) APPELLANT WAS NOT INFORMED OF HIS RIGHT TO REFUSE TO PROVIDE A SPECIMEN, AND (3) APPELLANT WAS NOT PROVIDED A CONSENT FORM AS REQUIRED BY NCIS STANDARD OPERATING PROCEDURES AND REGULATION. (CITATIONS OMITTED).

V. THE MILITARY JUDGE ERRED BY DENYING

which attack the findings of the court-martial and the sentence. Having considered the record of trial, the briefs of the parties, and the matters presented in oral argument, we have concluded that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed.

Factual Background

While the appellant, a patrolman with the Base Police Department, was working undercover with the

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APPELLANT'S MOTION FOR A FINDING OF NOT GUILTY WHEN THERE WAS NO TESTIMONY THAT (1) APPELLANT PROVIDED THE URINE SPECIMEN WHICH SUBSEQUENTLY TESTED POSITIVE, (2) APPELLANT'S SPECIMEN BOTTLE WAS SEALED IN THE PRESENCE OF THE OBSERVER/COORDINATOR, OR (30 THE SPECIMEN BOTTLE WAS RETURNED SEALED TO THE URINALYSIS COORDINATOR.

VI. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN DEFENSE COUNSEL MISINFORMED HIM THAT THE OFFICER MEMBERS WOULD BE OBTAINED FROM OUTSIDE HIS COMMAND; WHEN COUNSEL FAILED TO EFFECTIVELY VOIR DIRE COURT-MARTIAL MEMBERS; AND WHEN COUNSEL INEFFECTIVELY ARGUED APPELLANT'S CASE TO THE MEMBERS.

VII. APPELLANT WAS SUBJECTED TO UNLAWFUL COMMAND INFLUENCE WHEN TRIED BY A PANEL COMPOSED OF MEMBERS WHOSE FITNESS REPORTS WERE PREPARED BY THE SAME AUTHORITY THAT REFERRED THE CHARGE TO SPECIAL COURT-MARTIAL.

Naval Criminal Investigative Service [NCIS], his handler, Special Agent [SA] Burton, received information that the appellant had been using narcotics with the targets of his investigation. SA Burton requested that the appellant take a urinalysis. The appellant agreed, and SA Burton accompanied him to another base where the urinalysis was conducted. When the urinalysis indicated the presence of the cocaine metabolite, the appellant was charged with wrongful use of cocaine.

Evidence

The case-in-chief consisted of: (1) the urinalysis test results presented by the senior chemist and certifying scientist at the Navy Drug Screening Laboratory in Norfolk, which included testimony as to the nature of the metabolite and how it is introduced into the body; (2) testimony of the urinalysis coordinator establishing the initial leg of the chain-of-custody; and (3) testimony of the observer establishing that the sample presented to the coordinator came from the appellant.

The appellant presented two theories of defense: (1) that the appellant's character, truthfulness and role in law enforcement made it highly unlikely that he would knowingly ingest cocaine; and (2) that the appellant was somehow the victim of "unknowing ingestion," possibly at the hands of one or more of the persons he was investigating as a NCIS undercover agent. Evidence to support this "spiked drink" theory came from the appellant's and his wife's testimony recounting the days preceding the urinalysis. The testimony was presented in an attempt to show that the most likely opportunity for the ingestion occurred at a ball game where the appellant allegedly shared alcoholic beverages with some of the

targets of his undercover operation.

Sufficiency Of The Evidence

In his first assignment of error the appellant asserts that the evidence is insufficient to establish his guilt beyond a reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires this Court to determine not only the legal sufficiency of the evidence, but also its factual sufficiency. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this test we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993); *United States v. Blocker*, 32 M.J. 281 (C.M.A. 1991). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

After a careful review of this record, we are convinced beyond a reasonable doubt that the appellant knowingly and wrongfully ingested cocaine as alleged. Like the military members, we have found the appellant's testimony and defense incredible. This was not purely a "paper" case for the prosecution. *See United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987). The prosecution proved the presence of the metabolites of cocaine in the appellant's body and presented expert testimony that they are not naturally produced by the body or by any other

substance other than cocaine. This permitted an inference of wrongfulness. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). There is a permissive inference of wrongfulness absent evidence to the contrary. *Id.* Here the evidence to the contrary was not believable, therefore, the inference of wrongfulness remains and we will not overturn the appellant's conviction on this basis.

Non-Verbatim Record

The second allegation of error is moot as the missing pages from the appellant's record of trial have been provided.

Sentence Appropriateness

The appellant was an experienced petty officer serving in a law enforcement assignment who knowingly ingested cocaine. We specifically find that the sentence to a bad-conduct discharge was not inappropriately severe.

Motion to Suppress Urinalysis Results

The appellant moved to suppress the results of the urinalysis, asserting that his consent to the seizure of his urine was not voluntary. The appellant agreed to both of the urinalyses which were scheduled for him. The first was cancelled. The appellant agreed to the second and accompanied SA Burton to the collection point. SA Burton did not ask the appellant to sign a permissive search form nor did she inform the appellant that he could refuse to submit to the urinalysis.

A prosecutor relying upon consent to justify the lawfulness of a search has the burden of proving that the consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). We must look at the facts and circumstances surrounding the consent to determine if it was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). One test for voluntary consent to a urinalysis is set forth in *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Where the consent to a urinalysis is obtained without the threat of a command-directed urinalysis or a search warrant, the urinalysis results are admissible. 31 M.J. at 133.

The appellant, who was a law enforcement officer, was familiar with the procedures for obtaining consent for a search. Although he was not expressly advised of his right to refuse to provide a sample for the urinalysis, that did not mean that he was ignorant of that right. The military judge applied the proper standard in determining that the appellant's consent to the urinalysis was freely and voluntarily given. Record at 49-50. His denial of the motion to suppress was not an abuse of his discretion.

Motion For A Finding Of Not Guilty

Defense alleges that the military judge erred in denying the motion for a finding of not guilty, asserting that there was no evidence that: (1) the appellant provided the urine specimen which tested positive; (2) the appellant's specimen bottle was sealed in the presence of the observer/coordinator; or (3) the specimen bottle was returned sealed to the urinalysis coordinator.

The observer, AC2 Robinson, testified that the

appellant "walked over to the urinal, gave his sample and put the cap back on the sample, . . . and we walked back to the urinalysis room" where the appellant returned the bottle to the urinalysis coordinator. Record at 103.

Rule for Courts-Martial [R.C.M.] 917 sets forth the standard used in ruling on a motion for a finding of not guilty: the motion shall be granted only in the absence of some evidence, which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The testimony of Petty Officer Robinson was some evidence establishing each of the three circumstances wherein the appellant claims evidence was lacking.

Effective Assistance Of Counsel

The appellant has launched a three-pronged attack on the representation afforded to him by his trial defense counsel.

1. *The Defense Misinformed Him That The Officer Members Would Be Obtained From Outside His Command.*

The appellant's bare assertion is without support either in the record or in any of the accompanying documents. Nothing before this Court rebuts the presumption of competence of counsel on this issue.

2. *Counsel Failed To Effectively Voir Dire Court-Martial Members.*

Trial defense counsel's *voir dire* encompassed 24 pages of a 240-page record of trial. Record at 71-95. Additionally, the defense counsel had the benefit of the

military judge's several pages of *voir dire* of the members. As a result of the thorough examination of the members, the defense counsel successfully challenged one member for cause and peremptorily challenged another member. The appellant has not indicated what constitutes his criteria for ***effective voir dire***, and the record of trial satisfies this Court that the presumption of competence of counsel on this issue has not been rebutted.

3. *Counsel Ineffectively Argued Appellant's Case To The Members.*

The defense counsel presented argument which reminded the members of the Government's burden of proof, explained the defense theories and discussed the evidence in support of them, emphasized weaknesses in the Government's evidence, and reiterated the appellant's character evidence. Record at 212-214. Other than not achieving the result the appellant sought--an acquittal--the argument quite effectively used the resources the defense counsel had at his disposal.

Our examination of the record, which is conspicuously lacking in any affidavit from the appellant, satisfies this Court that the appellant has not sustained his burden of overcoming the presumption of competence of his counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Lewis*, 42 M.J. 1 (1995); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Defense counsel in this case competently and zealously represented the appellant. This issue lacks merit.

Unlawful Command Influence

The appellant claims he was harmed when he was

tried by a panel whose members' fitness reports were prepared by the convening authority. This assignment of error has no merit. UCMJ, Articles 23, 25.

Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.